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NOTES.

DELEGATION OF LEGISLATIVE POWER—VALIDITY OF REGULATION OF RAILROAD COMMISSION.

In a recent Georgia case the question of the delegation of legislative power was fully discussed. Inquiry into what constituted a delegation of such power, and is therefore unconstitutional, or, to call a spade a spade, to what extent it can be delegated, is peculiarly pertinent in this day of regulation by commissions.

The Georgia constitution vested the legislative power in a General Assembly. That body, by the Act of August 23, 1905,¹ empowered the Railroad Commission to make, prescribe and enforce such reasonable rules, regulations and orders as should be necessary to compel railroads to promptly receive, deliver, etc., all freights; and to provide the time within which railroads

¹ *Ga. Laws*, 1905, p. 120.

should furnish cars applied for in writing by shippers, and the penalty to be paid in the event of such cars not being furnished. In exercise of the power thus conferred, the Commission established Rule 9, requiring that cars be furnished shippers within four days after written application therefor, and imposing a penalty of one dollar per car per day after the expiration of the free time, to be paid to the shipper. The Supreme Court of Georgia held that Rule 9 was not void as an exercise of legislative power attempted to be delegated by the Act of 1905.²

In spite of a vehement dissent, it is fair to say that the majority opinion represents the trend of modern authority. All courts recognize the general proposition that purely legislative power, having been entrusted by the people to the legislature, cannot be delegated by that body.³ The ground for this rule is that the constitution in distributing the three fundamental powers of government, impliedly forbids their delegation. The courts are not at one as to the basis of this implication. The most reasonable way to ascertain its existence, the examination of the political theories predominant at the time of the adoption of the constitution in question, has seldom been adopted. Instead the principles of the Common Law are appealed to and the doubtful analogy of agency relied upon for support of the non-delegability rule.⁴ The legislature being the agent of the people for the purpose of exercising legislative functions, cannot place that office in the hands of a subordinate.

Whatever ground the rule is put upon, two apparent exceptions must be explained. It is never questioned that the legislature can delegate the power of self-government to localities. This is satisfactorily accounted for by the theory that the maxim against the delegability of legislative power must be "understood in the light of the immemorial practice of this country and of England, which has always recognized the propriety and policy of vesting in the municipal organizations certain powers of local regulation, in respect to which the parties immediately interested may fairly be supposed more competent to judge of their needs than any central authority."⁵ The justification of the admitted constitutionality of contingent legislation is more logical, and savors less of apology, as it

² *So. Ry. v. Melton*, 65 S. E. 665.

³ *Ry. Co. v. R. R. Comm.*, 161 Fed. 925, 985; *Wayman v. Southard*, 10 Wheaton 1, 10; *State v. Ry. Co.*, 47 So. 969, 976. See also cases cited in 57 Am. L. Reg. 70, n. 26.

⁴ 57 Am. L. Reg. 70, n. 27.

⁵ *Cooley, Const'l Lim.* (Fed.) 165.

falls in with the next step in the general rule that may now be considered.

Although the legislature "may not delegate the power to enact a law or to declare what the law shall be, or to exercise an unrestricted discretion in applying the law, it may enact a law, complete in itself, designed to accomplish a general public purpose,"⁶ and empower subordinate bodies of officials either to ascertain facts⁷ determining the application of the law, or pass rules and regulations⁸ suitable to its complete execution. In other words, after a complete expression of the legislative intent, the means of its fulfillment may be left to ministerial officers. In an early Ohio case the rule was clearly stated as follows: "The true distinction is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made."⁹ In accordance with these principles, conditional legislation is considered to be complete as a law, although the duty of ascertaining whether and to what extent it shall operate is placed by the legislature upon other shoulders.¹⁰ In like manner the regulation of various kinds of business by commissions is supported on the theory that in the act creating the commission definite principles of law were laid down, the application of which to the varying minutiae of economic conditions was to be determined by the subordinate body.¹¹ In theory this is sound, but in many of the cases so loose directions are given by the legislature, and the discretion left to the commissions is so broad, that the rule would seem to have been consumed away in its application. This seems to be true of acts empowering commissions to name "reasonable rates," the use of that legal

⁶ *State v. Ry. Co.* (*supra*).

⁷ *Prentice v. Eagan*, Comm. Cl. of Fed. Const. 311; *Co. v. U. S.*, 204, U. S. 364, and cases there cited.

⁸ *R. R. v. R. R. Comm.*, 70 Ga. 694, 699.

⁹ *R. R. v. Comm.*, 1 Ohio 77.

¹⁰ *Elwell v. Comstock*, 99 Minn. 261, (Act authorizing the official use of a voting machine if discovered to be efficient); *Trinity Co. v. Mendocino Co.*, 151 Cal. 279, (Act authorizing a commission to mark boundary lines between counties); *ex parte McManus*, 70 Pac. 702, (Act authorizing boards to grant or refuse state licenses for exercising certain professions); *The Aurora*, 7 Cranch 382, (Revival of act depending on future event to be ascertained and proclaimed by the president); *Field v. Clark*, 143 U. S. 649, (Act empowering president to put reciprocal tariff into effect against the various countries).

¹¹ *State v. Ry. Co.* (*supra*).

term being very elastic. Such legislation has, however, been justified on the ground that at best the line of demarcation between delegable and non-delegable powers is hazy,¹² and that an act of the legislature should not be declared unconstitutional except on the plainest ground.¹³

The act in the principal case seems to be less open to criticism than many that the courts have had no trouble in sustaining. Its directions are explicit as to the object and nature of the regulations to be made, the propriety of which ought not to be questioned in view of their similarity to rules of demurrage and reciprocal demurrage, the authority of commissions to enact which has never been successfully questioned.¹⁴

The objection is often urged against an act which, like the one in question, empowers the commission to fix "penalties" for breach of its regulations, that it delegates the power to enact penal laws. The looseness of the use of the terms penal and penalty is, however, well recognized, and an analysis of the exaction imposed in the principal case shows it to be not within the strict sense of the word penalty, which alone is applicable to the principle of non-delegability. A penal law in the strict sense is one, an offence against which is within the pardoning power of the sovereignty,¹⁵ and when a remedy is given for a private injury to an individual, by means of an action instituted by the aggrieved party, it is not a penalty within the narrow meaning of that term.¹⁶

E. S. B.

STATE DECISIONS AS PRECEDENTS IN FEDERAL COURTS.

The amended Constitution of Missouri provides that "Private property shall not be taken or damaged for public use, without just compensation."¹ In a decision under this clause, *Johnson v. St. Louis*,² the question came before the Circuit Court of Appeals, whether a plaintiff, who had notice that the city was about to lay a sewer in front of his buildings, and who took no steps to prop his wall, could recover for an injury caused by

¹² *Ry. v. Dey*, 35 Fed. 866; *Wayman v. Southard*, 10 Wheaton 1.

¹³ *Boston v. Cummins*, 16 Ga. 102.

¹⁴ *R. R. v. Keystone Lumber Co.*, 90 Miss. 391.

¹⁵ *Huntington v. Attrill*, 146 U. S. 657.

¹⁶ *Mansfield v. Ward*, 16 Me. 433; *Boice v. Gibbons*, 8 N. J. L. 324; *Sackett v. Sackett*, 25 Mass. 309.

¹ Ann. St. 1906, p. 148, art. 2, sec. 21.

² 172 Fed. 31.